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No. 07-247

IN THE

Supreme Court of the United States

STEPHEN M. TREZZA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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The government's response omits a material fact in its statement of this case. And, it compounds that omission by failing to respond to one of Petitioner Stephen M. Trezza's (Trezza's) primary arguments in his petition. Because of its material omissions, the government's response violates Rule 3.3 of the American Bar Association's (the ABA's) Model Rules of Professional Conduct regarding a lawyer's duty of candor to the court.

Specifically, the government omits in its response that, on October 16, 2006, District Judge David Bury entered a ***final judgment*** in this civil case. Rather, the government merely describes District Judge Bury's underlying order and omits the later final judgment. Resp. 4. The government's failure to correctly describe the factual and procedural background of this case is a material omission.

The government also failed, in any way, to respond to Trezza's argument, Pet. 5-7, that because this is a civil case and because a final judgment was entered, the final judgment rule of 28 U.S.C. § 1291 applies and required the Ninth Circuit to hear Trezza's appeal on its merits. Instead, the government mischaracterizes Trezza's argument at page 5 of its response:

> Petitioner contends (Pet. 4-11) that the court of appeals erred in failing to treat the denial of his motion for return of property under Fed. R. Crim. P. 41(g) as a final order, and therefore immediately appealable under 28 U.S.C. § 1291.

Trezza has never maintained that District Judge Bury merely entered a "final order." As the government knows, the words "order" and "judgment" have very specific–and distinct–meanings. Likewise, the government's suggestion

that Trezza's argument involves an "immediately appealable" order is a clear reference to the law regarding interlocutory appeals and the exceptions to the general rule that interlocutory appeals are not permissible.

This case does not involve a "final order." This case does not involve an interlocutory appeal. A final, civil judgment was entered by District Judge Bury. That judgment was immediately appealable.

Rule 3.3 of the ABA's Model Rules of Professional Conduct states that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The comment to Rule 3.3 specifies that Rule 3.3 is designed to ensure that lawyers do not engage in conduct that "undermines the integrity of the adjudicative process" and a lawyer "must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false."

Here, the government's response omitted a material fact in the procedural history of this case. If one only read the government's response, the reader would believe that no final, civil judgment had been entered by the District Court.

The government's entire response is written as though no final, civil judgment was entered and the most significant part of the lower court record does not exist. The government's omission and subsequent argument based on that omission has the potential to mislead this Court about the real issue of this case.

Any ruling made by this Court in reliance on the arguments made in the government's response would

critically "undermine[] the integrity of the adjudicative process" in this case.

As Trezza consistently has argued, there is no authority that supports the conclusion that, in a civil case, a final judgment is not appealable. The government chose to ignore Trezza's argument and instead argued that *DiBella v. United States*, 369 U.S. 121 (1962), applies to prevent Trezza from appealing the "order" of the district court. *DiBella* does not apply. This is a civil case. *DiBella* was a criminal case. Here, a final, civil judgment was entered. No final judgment was entered in *DiBella*.

No amount of misleading analysis can change the simple facts of this case: This case is a civil case and was formally treated as a civil case—as the government admits at Resp. 7 n. 4. A ***final judgment*** was entered in this civil case. *See* Pet. App. C. Final judgments in civil cases are appealable. *See* 28 U.S.C. § 1291; *see also, e.g., Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1249 (9th Cir. 1998) ("The final judgment rule, which is embodied in 28 U.S.C. § 1291, empowers circuit courts to hear appeals from ***all*** final judgments issued by the district courts.") (Emphasis added).

No case law or statute cited by the government contradicts, or even attempts to respond to any of the foregoing facts or law. None of the cases relied upon by the government, including *DiBella*, involved a final judgment in a civil case.

Contrary to the government's argument, this Court should resolve the split among the circuit courts of appeals regarding the meaning in *DiBella* that motions for return of property are independent and immediately appealable,

only if such a motion is "in no way tied to a criminal prosecution *in esse* against the movant." *DiBella*, 369 U.S. at 131-32.

Another reason for granting Trezza's petition involves the "taint team." As the government admits, a "taint team" was used during the execution of the search warrants in this case. Resp. 2. The "taint team," of fellow government investigators, reviewed seized material to determine if any privileged material was seized. After that review, some seized materials were returned to Trezza. The remaining documents then were forwarded to the investigative team. Both the investigative team and the "taint team" consisted of Internal Revenue Service (IRS) agents and Assistant United States Attorneys, all in the same Arizona offices.

The "taint team" procedure used by the government was illegal. The law is unsettled as to whether the "in-house" "taint team" used here is permissible or whether the procedure described by the Ninth Circuit in *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915 (9th Cir. 2006), must be used. In *Comprehensive Drug Testing*, the Ninth Circuit found that, instead of a "taint team" procedure similar to that used here, the seized materials should have been submitted to a neutral magistrate for review, before being released to the government's investigators. A similar procedure was used in *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, 497 F.3d 654 (D.C. Cir. 2007), where materials seized from a sitting Congressman's office were reviewed by a "filter team" to determine whether they were privileged under the Speech and Debate Clause. *Id.* at 657. Those items found to be potentially privileged were then turned over to the district court for its review. The

D.C. Circuit found that the Speech and Debate Clause was violated by the Executive branch's review before turning over matters to the District Court. *See also United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995).

This Court should grant Trezza's petition for certiorari and find that jurisdiction exists for the Ninth Circuit to hear on its merits Trezza's appeal regarding the "taint team" procedure.

This is an important issue that both Trezza and the government have an interest in seeing resolved. The government is employing different methods in using "taint" or "filter" teams. The Ninth Circuit must address this issue so that the legality of such a procedure will be set for future use.

CONCLUSION

Trezza's petition for certiorari should be granted. This Court should rule that the Ninth Circuit erred in not permitting Trezza to appeal a final judgment in a civil case.

This Court should deem the government's failure to address Trezza's argument as a confession of error.

This Court also should grant Trezza's petition to resolve the split among the circuits regarding the appealability of denials of Rule 41(g), Fed. R. Crim. P., motions.

This Court should remand this appeal to the Ninth Circuit so that it can address Trezza's arguments regarding the use of the "taint team" procedure.

Respectfully submitted,

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